

Notes

Special Police: A Benefit or a Threat?

I. INTRODUCTION

Private security is becoming big business as more companies consider it necessary to supplement the protection provided by local law enforcement officials by hiring special police to guard their property.¹ Although this additional protection, if properly exercised, could benefit private employers by preventing or reducing thievery and vandalism, the current law in the State of Ohio leaves the expanding field of private security open to abuse by these employers and their security personnel. The statutory authority for special police is unclear, and the courts' task is complicated by various categories of special police.²

Private security functions are currently performed by private police, special deputy sheriffs, and noncommissioned private security guards. Special police generally are not considered to be peace officers³ nor do they receive the extensive training statutorily mandated for peace officers.⁴ The legislature and the courts have not delineated clearly the bounds of authority of special police; therefore none of these entities, least of all the special police, understands the scope of their authority. Until these boundaries are clearly established, private individuals risk having their constitutional rights violated or having various torts, such as false imprisonment or assault and battery, inflicted upon them by the special police.⁵ This Comment will examine current Ohio law concerning the various categories of special police and will make recommendations for changes to eliminate these problems.

II. PEACE OFFICERS' AUTHORITY AND TRAINING

A. *Peace Officers*

The primary law enforcement officer in the State of Ohio is the peace officer. Unlike the various categories of special police,⁶ the peace officer's role and training are clearly defined by statute. A peace officer is defined as:

A deputy sheriff, marshal, deputy marshal, member of the organized police department of a municipal corporation, or township constable, who is commissioned and employed as a peace officer by a political subdivision of this state, and whose primary duties are to preserve the peace, to protect life and property, and to enforce the laws of Ohio, ordinances of a

1. See generally Comment, *Reality and Illusion: Defining Private Security Law in Ohio*, 13 U. Tol. L. Rev. 377 (1982).

2. For purposes of this Comment, the term "special police" will be used when referring collectively to all of these various categories.

3. See *infra* note 7 and accompanying text.

4. See *infra* notes 11-20 and accompanying text.

5. See generally Part IV, *infra*.

6. See *infra* Parts III and IV.

municipal corporation, or regulations of a board of county commissioners or board of township trustees, or any such laws, ordinances, or regulations⁷

A peace officer is authorized to arrest any person whom the officer observes committing an offense, whether it is a misdemeanor or a felony,⁸ or any person the officer has reasonable cause to believe has committed an offense of violence, the offense of domestic violence, a theft offense, or a felony drug abuse offense.⁹ A peace officer is further authorized to pursue, arrest, and detain persons outside the limits of the officer's jurisdiction if the pursuit takes place within a reasonable time after the offense is committed, begins within the officer's jurisdiction, and if the offense is a felony, a first or second degree misdemeanor, or a traffic offense for which points are chargeable.¹⁰

B. The Ohio Peace Officer Training Council

No person may receive a permanent commission as a peace officer without successfully completing an approved basic peace officer training program and obtaining a certificate to that effect.¹¹ A holder of a temporary commission must complete an approved program within one year after receiving the commission or else forfeit it.¹² The Ohio Peace Officer Training Council is charged with establishing training courses and schools for peace officers.

The Ohio Peace Officer Training Council is a nine-member board within the Attorney General's Office¹³ with the authority to recommend rules to the Attorney General concerning the training of peace officers.¹⁴ The recommendations may encompass minimum courses of study, minimum basic training for probationary peace officers, and advanced training programs for peace officers.¹⁵ Persons satisfactorily completing the basic training course established by the Council are certified by the Council's executive director.¹⁶

7. OHIO REV. CODE ANN. § 109.71(A)(1) (Page 1984).

8. *Id.* § 2935.03(A).

9. *Id.* § 2935.03(B).

10. *Id.* § 2935.03(D).

11. *Id.* § 109.77(A).

12. OHIO ADMIN. CODE § 109:2-1-11(A) (1985).

13. OHIO REV. CODE ANN. § 109.71 (Page 1984). The members of the Council are appointed by the governor according to the statutory scheme:

[O]ne member representing the public; two members who are incumbent sheriffs; two members who are incumbent chiefs of police; one member from the bureau of criminal identification and investigation; one member from the state highway patrol; one member who is the special agent in charge of a field office of the federal bureau of investigation in this state; and one member from the state department of education, trade and industrial education services, law enforcement training.

Id.

14. *Id.* § 109.73(A).

15. *Id.* The Attorney General may then adopt the Council's proposals in whole or in part. *Id.* § 109.74.

16. *Id.* § 109.75.

C. Basic Peace Officer Training Program

The basic peace officer training program currently provides for a 280-hour course of study.¹⁷ Council rules set forth nine subjects to be covered in the training program and suggest the number of study hours to be spent on each subject.¹⁸ The rules enumerate suggested topics for each subject but give latitude to instructors to develop the scope of each subject.¹⁹

The basic training program instructs the prospective peace officers in all aspects of police work. Course topics include criminal law (including laws of arrest, criminal procedure, and mechanics of arrest), criminal evidence (including rules of evidence and search and seizure), criminal investigation (including surveillance, interviews, and confidential informants), patrol techniques (including domestic disputes, gambling and vice, narcotics, and alcohol abuse), and police skills (including firearm training, first aid, and human relations).²⁰

Law enforcement officers thus receive training in a wide range of law enforcement topics before receiving permanent commissions as peace officers. This training is designed to ensure that peace officers understand both the scope and the legal limitations of their powers.

Only law enforcement officers defined by statute as "peace officers,"²¹ are required to take the training program. Most special police are not;²² instead, the Ohio Police Officer Training Council offers a voluntary training program for special police.²³ However, since the scope of authority for special police has not been clearly delineated by the legislature or the courts, special police often perform the same acts as duly commissioned peace officers.²⁴ Thus, special police can engage in law enforcement activities without the benefit of the extensive training that peace officers receive before obtaining their permanent commissions. This lack of training increases the potential for special police unwittingly to exceed the nebulous parameters of their authority.

III. STATUTORY AUTHORITY FOR SPECIAL POLICE

In addition to the category of peace officers, several categories of special police have developed in Ohio. Special police may be appointed either by political subdivisions or private employers.

A. Special Deputy Sheriffs

The authority for commissioning special deputy sheriffs is clouded at best. County sheriffs have statutory authority to "appoint, in writing, one or more

17. OHIO ADMIN. CODE § 109:2-1-16 (1985).

18. *Id.*

19. *Id.*

20. *Id.*

21. OHIO REV. CODE ANN. § 109.71(A)(1) (Page 1984); *see supra* note 7 and accompanying text.

22. *See infra* Parts III and IV.

23. OHIO REV. CODE ANN. § 109.78(A) (Page 1984); *see infra* Part III.

24. *See infra* Part IV.

deputies.”²⁵ This simple language apparently provides the basis for sheriffs’ departments in the state to appoint both regular and special deputies. The statute does not define regular or special deputies, so the distinction between the two is vague. As a general matter, a regular deputy appears to be an officer who is employed on a full-time basis within the sheriff’s department under the direct supervision and control of the sheriff. A special deputy either serves outside the sheriff’s department under the direction and supervision of another, such as a merchant, or serves the sheriff’s department from time to time as needed.²⁶ Some courts have ruled that there is no statutory authority for commissioning special deputy sheriffs.²⁷

The detailed training requirements of the Ohio Peace Officer Training Council apply to deputy sheriffs,²⁸ but neither the statute providing for the appointment of deputies²⁹ nor the statute defining “peace officer”³⁰ distinguishes between regular and special deputies. To the extent special deputies perform the duties of regular deputies, special deputies should receive the basic peace officer training. However, the statute authorizing a voluntary training program for special police provides that the completion of this program satisfies the educational requirements for special deputies.³¹ The dearth of statutory authority for the appointment of special deputies makes the legislative intent of this provision impossible to ascertain.

The sheriff is statutorily responsible for the official misconduct of his deputies, but the statute does not distinguish regular from special deputies in imposing this liability.³² The scope of special deputies’ authority often is limited by their commissions to particular locations. For example, when special deputies are employed as store security guards their commissions are limited to the store’s premises. At least one court has held that, under these circumstances, the acts of special deputies are the acts not of the sheriff’s department but of the private employer.³³

B. Private Police

A private police officer is employed in the private sector rather than by the licensing municipality.³⁴ City directors of public safety are authorized by statute to commission private police officers.³⁵

25. OHIO REV. CODE ANN. § 311.04 (Page 1979).

26. *State ex rel. Geyer v. Griffin*, 80 Ohio App. 447, 448, 76 N.E.2d 294, 296 (1946).

27. *Id.* at 457, 76 N.E.2d at 299; *State v. McDaniel*, 44 Ohio App. 2d 163, 174, 337 N.E.2d 173, 180 (1975). See *infra* notes 87–94 and 109–20 and accompanying text.

28. OHIO REV. CODE ANN. § 109.71(A)(1) (Page 1984); see *supra* notes 7, 17–20 and accompanying text.

29. OHIO REV. CODE ANN. § 311.04 (Page 1979).

30. *Id.* § 109.71(A) (Page 1984).

31. *Id.* § 109.78(A); see *infra* notes 44–53 and accompanying text for further discussion of this training course. But see *Bennett v. F. & R. Lazarus*, Case No. 83CV–02–1245 (Franklin County C.P., March 5, 1985), *infra* notes 121–29 and accompanying text, in which the trial court ruled that a special deputy forfeited her commission by reason of her failure to complete the basic peace officer training program within one year of her appointment; *Op. Att’y Gen. No. 67–123* (1967) and *No. 77–027* (1977), in which the Attorney General stated that to the extent special deputies are performing the duties of regular deputies, they must receive the same training as regular deputies.

32. OHIO REV. CODE ANN. § 311.05 (Page Supp. 1984).

33. *State v. McDaniel*, 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975).

34. *Op. Att’y Gen. No. 66–179* (1966).

35. OHIO REV. CODE ANN. § 737.05 (Page 1976).

Private police officers have the same powers as peace officers employed by the licensing municipality.³⁶ Further, the Ohio Peace Officer Training Council program³⁷ applies to private police. If the basic training program has not been completed within one year from the date of appointment, the commission is forfeited.³⁸ The private police officer, unlike the special deputy sheriff, receives extensive education provided by the basic peace officer training program and is better prepared to exercise the powers and duties of a regular peace officer.

C. Security Guards

No statutory provisions exist to provide licensing requirements or to delineate the powers of persons privately employed as security guards or in related capacities. The Ohio Peace Officer Training Council sponsors a training program covering the duties and powers of private police, which is available on a voluntary basis to all persons privately employed.³⁹

In the absence of express statutory authority, private citizens may not detain or arrest persons they observe committing a misdemeanor.⁴⁰ The rationale is apparently that the benefit of detaining misdemeanants is substantially outweighed by the potential for harm to both the public and the parties involved in the detention. Therefore, private security guards without peace officers' commissions have no general power to detain someone committing a misdemeanor on their employer's premises.

A statutory exception to this common law rule authorizes merchants and their employees to detain suspected shoplifters:⁴¹

- (A) A merchant, or his employee or agent, who has probable cause to believe that items offered for sale by a mercantile establishment have been unlawfully taken by a person, may, for the purpose set forth in division (C) of this section, detain the person in a reasonable manner for a reasonable length of time within the mercantile establishment or its immediate vicinity

....

- (C) . . . [A] merchant or his employer or agent pursuant to division (A) of this section may detain another person for any of the following purposes:
- (1) To recover the property that is the subject of the unlawful taking, criminal mischief, or theft;
 - (2) To cause an arrest to be made by a peace officer;
 - (3) To obtain a warrant of arrest⁴²

The power given to merchants and their security guards and other employees to conduct law enforcement activities is very limited. The statute does not provide

36. Op. Att'y Gen. No. 66-179 (1966).

37. See *supra* notes 17-20 and accompanying text.

38. Op. Att'y Gen. No. 66-179 (1966).

39. OHIO REV. CODE ANN. § 109.78(A) (Page 1984); see *infra* Part II (D).

40. *Fischer v. Rollman & Sons Co.*, 31 Ohio App. 340, 167 N.E. 469 (1929).

41. OHIO REV. CODE ANN. § 2935.041 (Page 1982).

42. *Id.* A peace officer who has probable cause to believe that a person has been shoplifting may arrest that person without a warrant. *Id.* § 2935.041(E).

blanket authority for any person to detain a suspected thief, nor is it blanket authority for merchants or their employees to detain persons for any and all crimes committed within the store. Shoplifting is the only crime for which this power of detention is granted.⁴³

D. *Private Basic Course Training Program*

The Ohio Peace Officer Training Council⁴⁴ has established a voluntary training program⁴⁵ for those special police not required to take the basic training program for peace officers.⁴⁶ The voluntary program covers the duties and jurisdiction of persons privately employed in a police capacity.⁴⁷

The current training program provides a 118-hour course of study.⁴⁸ As in the basic peace officer training course,⁴⁹ Council rules set forth the subjects to be covered and the number of hours to be devoted to each.⁵⁰ While instructors can use discretion in developing their subjects, each subject in the basic curriculum must be covered in its entirety.⁵¹

Some of the topics, such as shoplifting and patrol of private property, are designed specifically for the limited duties and jurisdiction of special police.⁵² Other topics, such as the laws of arrest, criminal law, and rules of evidence, parallel the basic training course for peace officers but are covered in much less detail.⁵³

IV. CASE LAW AUTHORITY FOR SPECIAL POLICE

A. *Peace Officers Acting as Security Personnel*

Peace officers often act as private security personnel during their off-duty hours. The scope of their authority while acting in this private capacity and the responsibility of the licensing municipality for their acts when performing security duties are somewhat ambiguous.

In *State v. Glover*,⁵⁴ the defendant was arrested and convicted for shoplifting and resisting arrest by an off-duty Columbus police officer privately employed as a security guard for a grocery store.⁵⁵ The defendant contended on appeal that he could not be guilty of resisting arrest because the officer was acting solely for the benefit of his private employer.⁵⁶ The Franklin County Court of Appeals upheld the

43. *State v. Griffin*, 54 Ohio Misc. 52, 376 N.E.2d 1364 (Akron Mun. Ct. 1977).

44. *See supra* Part II (B).

45. OHIO REV. CODE ANN. § 109.78(A) (Page 1984); OHIO ADMIN. CODE § 109:2-3 (1985).

46. *See supra* Part II (C).

47. OHIO REV. CODE ANN. § 109.78(A) (Page 1984).

48. OHIO ADMIN. CODE § 109:2-3-11 (1985).

49. *See supra* Part II (C).

50. OHIO ADMIN. CODE § 109:2-3-11 (1985).

51. *Id.*

52. *Id.*

53. *Id.* For example, 44 hours are devoted to criminal law in the basic peace officer training course, while private security personnel are given only 4 hours of instruction on criminal law. *Id.* §§ 109:2-1-16, 109:2-3-11.

54. 52 Ohio App. 2d 35, 367 N.E.2d 1202 (1976).

55. *Id.* at 38, 367 N.E.2d at 1204.

56. *Id.* at 35-36, 367 N.E.2d at 1203.

conviction, holding that duly commissioned police officers have a continuing obligation to serve the public notwithstanding private employment as security guards. The arrest of the defendant was therefore lawful.⁵⁷

In *State v. Fields*,⁵⁸ the court held that a township constable exceeded his statutory powers while acting as the agent of a private entity.⁵⁹ Township constables are not "peace officers" statutorily permitted to conduct warrantless arrests of persons based upon reasonable cause; the constable must witness the offense.⁶⁰ The constable was assigned to security duty at a shopping mall pursuant to a contract between the township trustees and mall management, and the township, not mall management, paid him and directed his activities.⁶¹ He had arrested the shoplifting suspect without observing the alleged offense. The arrest was therefore an improper exercise of his duties as township constable.⁶² Although merchants and their employees may detain suspected shoplifters for probable cause, the court held that the township constable was acting within his official duties and could not be acting simultaneously as a merchant's agent.⁶³

In addition, two courts of appeal have held that a deputy sheriff is acting outside the scope of his official duties while performing security activities for a private entity.⁶⁴ The private employer was therefore liable for wrongful acts committed by the deputies in the course of their private employment.⁶⁵

Of these cases, only *Glover* allows the officer to act simultaneously as the agent of both the state and the merchant. *Glover* can be distinguished from the deputy cases in that the deputies appear to be special deputies who had not received the training mandated for peace officers that the police officer in *Glover* had received.⁶⁶ The result in *Fields* was based on the provision of section 2935.03, which prohibits township constables from detaining misdemeanants based on probable cause, rather than on the constable's employment status.

B. Private Police Officers

Private police officers are publicly commissioned but privately employed.⁶⁷ Although not employed by the licensing municipality, they have been held to have the same powers of arrest and detention as peace officers.⁶⁸ The employer of the private

57. *Id.* at 38, 367 N.E.2d at 1204.

58. 62 Ohio Misc. 14, 405 N.E.2d 740 (Belmont County Ct. 1979).

59. *Id.* at 18, 405 N.E.2d at 742.

60. *Id.*

61. *Id.* at 15, 405 N.E.2d at 741.

62. *Id.* at 18, 405 N.E.2d at 742.

63. *Id.* This puts the township constable, a "peace officer" under section 109.71, in the rather anomalous position of having less power than a merchant and its employees.

64. *Garman v. O'Neill*, 31 Ohio L. Abs. 650 (Ct. App. 1939); *Duff v. Corn*, 84 Ohio App. 403, 87 N.E.2d 731 (1947).

65. In these cases, the courts characterized the deputies as regular deputies. However, the courts used descriptions that indicate they were in all likelihood "special deputies" as that term is now used. A more detailed discussion of these two cases appears in Part IV (C). See *infra* notes 95-108 and accompanying text.

66. See *supra* notes 28-31 and accompanying text.

67. See *supra* notes 34-36 and accompanying text.

68. See *supra* note 36 and accompanying text.

police officer, however, may be liable for the acts of the officer in certain circumstances.

In *New York, Chicago & St. Louis Railroad v. Fieback*,⁶⁹ the Ohio Supreme Court held that a railroad police officer was a "public officer" even though privately employed.⁷⁰ The plaintiff, Fieback, waiting to meet one of the defendant's employees at the defendant's railroad yard, aroused the suspicion of a railroad employee⁷¹ who was commissioned as a railroad police officer.⁷² A scuffle ensued, and the plaintiff sustained various injuries for which he sought recovery from the railroad.⁷³ Railroad police officers are given all the powers of municipal police officers and are authorized to exercise them in performing their duties on behalf of the railroad, and their acts are presumed to be within their official duties.⁷⁴ When a railroad officer commits an act outside the public duty of a municipal police officer, the railroad will be liable for the wrongful act if it authorized or ratified such conduct.⁷⁵ The railroad was not liable for Fieback's injuries because he failed to demonstrate that the officer was acting outside the scope of his official duties.⁷⁶

The *Fieback* reasoning was followed in *Neopolitan v. United States Steel Corp.*⁷⁷ The plaintiffs were detained by two private policemen employed as security guards by U.S. Steel. The plaintiffs' truck broke down on a road leading to the defendant's property, and the plaintiffs' apparent loitering near the plant aroused the suspicions of the officers who detained but did not arrest them. The officers released the two men after ascertaining that no property had been stolen.⁷⁸ The two officers, duly commissioned private police, derived their power from the state and therefore were acting within the scope of their official duties in detaining the plaintiffs.⁷⁹

*City of Cleveland v. Kufrin*⁸⁰ involved a warrantless arrest effected by a private police officer. The defendant, Kufrin, reached through an open car window and removed a signal flasher from the dashboard. The officer observed the act and apprehended him.⁸¹ Although private police are not among those persons enumerated by statute⁸² as possessing the power to effect warrantless arrests, the city council is authorized to prescribe rules for the conduct of these officers.⁸³ The Cleveland city council authorized private police to arrest any person committing a misdemeanor in

69. 87 Ohio St. 254, 100 N.E. 889 (1912).

70. *Id.* at 264, 100 N.E. at 891. The court used the term "public officer" to signify that the railroad police officer derived his power from the state, rather than from his private employer, under provisions of the Ohio Revised Statutes then in force. Railroad police are considered peace officers under a current statute, OHIO REV. CODE ANN. § 109.71(A)(2) (Page 1984).

71. *New York, C. & St. L. R.R. v. Fieback*, 87 Ohio St. 254, 255, 100 N.E. 889 (1912).

72. *Id.* at 264, 100 N.E. at 890.

73. *Id.* at 255-56, 100 N.E. at 889.

74. *Id.* at 264, 100 N.E. at 891.

75. *Id.* at 265, 100 N.E. at 891.

76. *Id.* at 266, 100 N.E. at 891.

77. 149 N.E.2d 589 (Ohio Ct. App. 1956).

78. *Id.* at 590-91.

79. *Id.* at 593-94. See *supra* notes 34-36 and accompanying text.

80. 3 Ohio Misc. 2d 18, 446 N.E.2d 230 (Cleveland Mun. Ct. 1982).

81. *Id.* at 19, 446 N.E.2d at 231.

82. OHIO REV. CODE ANN. § 2935.03 (Page 1982).

83. *Id.* at § 737.051 (Page 1976).

the officer's presence.⁸⁴ Therefore, the warrantless arrest of Kufrin was a proper exercise of power by a private police officer.⁸⁵

C. Special Deputy Sheriffs

As previously noted, there is no statutory authority for commissioning special deputy sheriffs.⁸⁶ However, common law has been held to provide for such deputies. As the court stated in *State ex rel. Geyer v. Griffin*:⁸⁷

There is no statutory restriction upon the right of a county sheriff to appoint special and general deputies, except that the appointments must be approved by the common pleas judge of the county of which the sheriff is an officer, and, therefore, the common law prevails authorizing the sheriff to make such appointments.⁸⁸

The court in *Geyer* identified two types of special deputy sheriffs. The first type includes those deputies appointed at the request of various business enterprises "for the sole purpose of keeping peace and protecting the properties and enterprises of such industrial, manufacturing and other establishments . . . such deputy sheriffs to be paid by the . . . establishments and to receive no compensation from the county by the sheriff on which they were so appointed."⁸⁹ The second category includes special deputies not regularly employed by the sheriff's office but subject to assignment by the sheriff as the need arises.⁹⁰ The relator, *Geyer*, was a special deputy of the second type.⁹¹ Thereafter, he was employed as a full-time deputy sheriff.⁹² However, the auditor refused to pay *Geyer* for services performed, resulting in a mandamus action to compel payments.⁹³ The court ordered payment, holding that the sheriff is granted the discretion to employ deputies, assign duties, and fix compensation for the deputies so employed.⁹⁴

*Garman v. O'Neill*⁹⁵ involved a deputy sheriff who was employed not by the county but as a security guard for an automobile dealership. Although the court characterized *O'Neill* as a regular deputy, he was commissioned to act as a private security officer for local businesses, indicating that he was a special deputy sheriff of the first type defined in *Geyer*.⁹⁶ While the officer was patrolling the dealer's showroom, his gun, which he carried by virtue of his deputy's commission, fell from its holster and discharged, wounding a salesman, who sued the sheriff for the resulting injuries.⁹⁷ The court found that the officer was not acting in his official

84. *City of Cleveland v. Kufrin*, 3 Ohio Misc. 2d 18, 20, 446 N.E.2d 230, 233 (Cleveland Mun. Ct. 1982).

85. *Id.* at 21, 446 N.E.2d at 233.

86. *See supra* notes 25-27 and accompanying text.

87. 80 Ohio App. 447, 76 N.E.2d 294 (1946).

88. *Id.* at 447, 76 N.E.2d at 295.

89. *Id.* at 448, 76 N.E.2d at 296.

90. *Id.*

91. *Id.* at 449, 76 N.E.2d at 296.

92. *Id.* at 450, 76 N.E.2d at 297.

93. *Id.*

94. *Id.* at 457, 76 N.E.2d at 300.

95. 31 Ohio L. Abs. 650 (Ct. App. 1939).

96. *See supra* text accompanying note 89.

97. *Garman v. O'Neill*, 31 Ohio L. Abs. 650, 650 (Ct. App. 1939).

capacity as a deputy sheriff. The only connection between the injury and his deputy status was that the commission authorized him to carry a gun.⁹⁸ Therefore, the sheriff was not liable for the deputy's negligence.⁹⁹

*Duff v. Corn*¹⁰⁰ was a wrongful death action against the owner of a bar employing a deputy sheriff in a security capacity. The deceased was ejected from the defendant's establishment by a deputy Mays¹⁰¹ who shot the deceased in the back after the deceased had left the bar and was walking toward the street.¹⁰² Mays was not a deputy sheriff when hired by the defendant. The defendant caused him to be appointed as a deputy shortly after he was hired.¹⁰³ The defendant contended that he was not liable because Mays was acting in his official capacity as a deputy sheriff at the time of the shooting.¹⁰⁴ The court of appeals held that the employer, not the state, is liable for the negligent acts of such officers committed while performing private duties.¹⁰⁵ The court noted that excusing the employer from liability for these acts would allow the "grossest acts of infamy and outrage"¹⁰⁶ to be committed by such officers with virtually no legal recourse available to their victims:

The state would not be liable for such acts, and if the employer—that is, the master, who makes the officer his representative for his private purposes—is not, because the wrongdoer is a police officer, such officer may perform the work he is employed to do in the most grossly careless, wanton, and wilful manner, fraught with great peril to others, and the injured party must look to the wrongdoer, usually of no pecuniary responsibility, and not the employer, who employed the wrongdoer to do the very acts complained of, but not in a wanton, wilful, and negligent manner, a mode fraught with peril to others.¹⁰⁷

Therefore, the employer, not the sheriff, was liable for the wrongful act of shooting the decedent.¹⁰⁸

In *State v. McDaniel*,¹⁰⁹ the Court of Appeals for Franklin County held that a special deputy sheriff was not performing public duties while acting as a full-time private security guard.¹¹⁰ The defendants in six consolidated cases had been arrested and charged with shoplifting in a Lazarus department store.¹¹¹ The defendants were surreptitiously observed by store security guards while in a store's fitting rooms. The guards observed the defendants from a vacant fitting room either by kneeling on the floor to watch the suspect's actions in the fitting room mirror or by climbing on shelves and removing a ceiling tile to peer down into adjacent fitting rooms.¹¹² The

98. *Id.* at 651.

99. *Id.*

100. 84 Ohio App. 403, 87 N.E.2d 731 (1947).

101. *Id.* at 404, 87 N.E.2d at 733.

102. *Id.* at 408, 87 N.E.2d at 743.

103. *Id.* at 406, 87 N.E.2d at 734. Although not characterized as such, Mays appears to have been a special deputy of the first type described in *Geyer*. See *supra* text accompanying note 89.

104. *Duff v. Corn*, 84 Ohio App. 403, 405, 87 N.E.2d 731, 733 (1947).

105. *Id.* at 409, 87 N.E.2d at 735.

106. *Id.*

107. *Id.* at 410, 87 N.E.2d at 735.

108. *Id.* at 412, 87 N.E.2d at 739.

109. 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975).

110. *Id.* at 174, 337 N.E.2d at 180.

111. *Id.* at 164, 337 N.E.2d at 175.

112. *Id.* at 165-66, 337 N.E.2d at 176.

trial court ruled that the evidence obtained by this observation was inadmissible because it constituted "an invasion of the privacy of the defendants and . . . an unreasonable search in violation of constitutional prohibitions."¹¹³

The court agreed that these actions violated the defendants' right of privacy,¹¹⁴ but held that the evidence was not subject to the exclusionary rule of the fourth amendment to the United States Constitution.¹¹⁵ The exclusionary rule applies only to illegal searches performed by the government and its officers, and evidence seized by private individuals without any participation by a government official is admissible in a criminal proceeding.¹¹⁶ The fact that a large percentage of the store's security staff held commissions as special deputy sheriffs did not transform such searches into state action.¹¹⁷ As the court observed:

Only Lazarus controls the conduct and activities of its security employees. . . . They do not perform their duties for the benefit of the public but, rather, for the benefit of Lazarus. Thus, we conclude that the activities and conduct of the security employees herein involved did not constitute state action within the contemplation of constitutional prohibitions against unreasonable searches and seizures.¹¹⁸

The court rejected the suggestion that a special deputy is on official duty while employed full-time as a store security guard. The sheriff does not maintain any control over the conduct of the deputy; therefore, the deputy's activities do not constitute state action.¹¹⁹ The special deputies were acting only on behalf of their employer, and their activities were designed to "detect and prevent thievery," not to perform any public law enforcement function.¹²⁰

Most recently, the issue of a special deputy's authority was presented in *Bennett v. F. & R. Lazarus*.¹²¹ The plaintiff was arrested by three of defendant Lazarus' security personnel who allegedly believed plaintiff to be a convicted shoplifter previously ordered out of all Lazarus stores.¹²² Plaintiff contended that her detention and arrest by the individual defendants for criminal trespassing¹²³ were unlawful inasmuch as store security guards have the statutory power to detain only those persons suspected of shoplifting.¹²⁴ Defendants maintained that the special deputy commission possessed by one of the three guards empowered her to effect arrests for any and all criminal offenses occurring on defendant Lazarus' premises.¹²⁵ The

113. *Id.* at 166, 337 N.E.2d at 176.

114. *Id.* at 170, 337 N.E.2d at 178.

115. *Id.* at 176, 337 N.E.2d at 181.

116. *Id.* at 171, 337 N.E.2d at 177-78, citing *People v. Horman*, 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968).

117. *State v. McDaniel*, 44 Ohio App. 2d 163, 174-75, 337 N.E.2d 173, 180 (1975).

118. *Id.* at 175, 337 N.E.2d at 180-81.

119. *Id.* at 174-75, 337 N.E.2d at 180.

120. *Id.* at 175, 337 N.E.2d at 180.

121. Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985).

122. *See, e.g.*, Plaintiff's Trial Brief at 1-2, *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985).

123. OHIO REV. CODE ANN. § 2911.21 (Page 1982).

124. *See* Plaintiff's Trial Brief at 5, *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985).

125. *See* Defendants' Arbitration Brief at 8-10, *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985).

special deputy received her commission, limited on its face to Lazarus, on July 21, 1978, and completed the private basic training course program¹²⁶ in March 1979.¹²⁷ The trial court ruled that the special deputy forfeited her commission by reason of her failure to complete the basic peace officer training program mandated by Ohio Revised Code section 109.71 for deputy sheriffs.¹²⁸ The jury returned a verdict in favor of plaintiff, assessing punitive as well as compensatory damages against defendant Lazarus.¹²⁹

D. Private Security Guards

The final type of special police is private security guards who are not commissioned by any type of governmental unit. The power of detention granted to such persons is limited to suspected shoplifters.¹³⁰

In *State v. Bolan*,¹³¹ the Ohio Supreme Court held that a store security guard's limited power of detention does not make the guard a law enforcement officer. Therefore, the questioning of a suspected shoplifter by security personnel does not require *Miranda* warnings.¹³² The defendant was observed taking a pair of gloves by a security guard. The guard detained the defendant and gave him some but not all of the *Miranda* warnings.¹³³ The defendant contended that his confession to the security guard was inadmissible because the *Miranda* warnings were not fully given.¹³⁴ The court rejected this contention, stating:

[W]here, pursuant to R.C. § 2935.041, an employee of a merchant has detained a person whom he has probable cause to believe has unlawfully taken items for sale by the mercantile establishment, an admission or confession made during such detention is not rendered inadmissible by the failure of such employee to fully explain to such detained person those constitutional rights set forth in *Miranda*.¹³⁵

Similarly, the court in *State v. Edwards*¹³⁶ rejected the notion that a store security guard becomes a law enforcement officer by virtue of his statutory power to detain suspected shoplifters.¹³⁷ "The statutory right of a civilian to detain does not

126. See *supra* text accompanying notes 44-53.

127. Transcript at 128, 132; Plaintiff's Trial Exhibits 3 and 4, *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985).

128. Transcript at 709, *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985).

129. *Id.* at 717. The jury awarded plaintiff \$20,000.00 for compensatory damages and \$200,000.00 for punitive damages. *Id.* The trial court granted defendant Lazarus' motion for a new trial on the ground that the amount of the verdict was against the manifest weight of the evidence; however, the trial court expressly declined to reverse the legal rulings made at trial concerning the special deputy issue. Decision and Entry at 2, *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., October 3, 1985). The case was settled by the parties during appeal.

130. See *supra* notes 39-42 and accompanying text.

131. 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971).

132. *Id.* at 18, 271 N.E.2d at 840-41. This, however, is a developing area of the law. For example, the Ohio Supreme Court held recently that *Miranda* warnings are required prior to any custodial interrogation, regardless of whether the offense alleged is a felony or a misdemeanor. *State v. Buchholz*, 11 Ohio St. 3d 24, 462 N.E.2d 1222 (1984).

133. *State v. Bolan*, 27 Ohio St. 2d 15, 17, 271 N.E.2d 839, 840-41 (1971). See *Miranda v. Arizona*, 384 U.S. 436 (1965).

134. *State v. Bolan*, 27 Ohio St. 2d 15, 17, 271 N.E.2d 839, 841 (1971).

135. *Id.* at 20, 271 N.E.2d at 843.

136. 50 Ohio App. 2d 63, 361 N.E.2d 1083 (1976).

137. *Id.* at 64, 361 N.E.2d at 1085.

make a police or other public officer out of the merchant or his employee while in the performance of acts in the retail establishment.”¹³⁸ The defendant contended that store security personnel had committed an unlawful search by removing stolen articles from a shopping bag into which the guards had observed the defendant placing the articles. The court held that the removal was not a search in the constitutional sense but was merely a lawful effort by a merchant to repossess stolen goods.¹³⁹ Moreover, assuming this action was a search, it would not have been unconstitutional. Citing *Bolan*¹⁴⁰ and *McDaniel*,¹⁴¹ the court held that store employees acting within the scope of their employment are not law enforcement officers and, therefore, the exclusionary rule does not apply.¹⁴²

Store security personnel exceed their authority by detaining persons suspected of misdemeanors other than shoplifting. In *State v. Griffin*,¹⁴³ the defendant successfully challenged the legality of his arrest by store security guards. The defendant was detained not for shoplifting but for obstructing justice—the guards alleged that the defendant interfered with the detention of another person who was suspected of shoplifting.¹⁴⁴ In dismissing the charge, the court stated:

Criminal statutes must be strictly construed and a reading of R.C. 2935.041 authorizes a store security employee to detain only such persons as may be believed to have unlawfully taken merchandise. *This is not blanket authority for detention of a person committing any misdemeanor in a department store, it must be a theft.*¹⁴⁵

The court stated that the security guards were acting solely within the scope of their employment; although one of the guards held a “special police officer” commission, he was acting on behalf of his private employer, not the state.¹⁴⁶

V. RECOMMENDATIONS AND CONCLUSIONS

Further abuses of the private security system¹⁴⁷ can be prevented by legislative attention to the area. While it is necessary for merchants and other businesses to employ private security personnel to prevent thievery and protect their property, the scope of authority for such personnel should be defined by legislation. The current statutory scheme is incomplete at best. Noncommissioned security personnel are authorized to detain only suspected shoplifters, but some of these noncommissioned guards exceed this authority, perhaps at the direction of their employer.¹⁴⁸ Private police officers are not statutorily authorized to exercise the powers of a peace officer

138. *Id.*

139. *Id.*

140. *State v. Bolan*, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971).

141. *State v. McDaniel*, 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975).

142. *State v. Edwards*, 50 Ohio App. 2d 63, 65, 361 N.E.2d 1083, 1085 (1976).

143. 54 Ohio Misc. 52, 376 N.E.2d 1364 (Akron Mun. Ct. 1977).

144. *Id.* at 53–54, 376 N.E.2d at 1366.

145. *Id.* at 54, 376 N.E.2d at 1366 (emphasis added).

146. *Id.* at 53, 376 N.E.2d at 1365. The court did not describe the type of commission held by the security guard, except to characterize it as “a special police” commission. *Id.*

147. See *supra* Part IV for examples of possible abuses (unlawful arrests, invasions of privacy, and shooting resulting in death).

148. See, e.g., *State v. Griffin*, 54 Ohio Misc. 52, 376 N.E.2d 1364 (Akron Mun. Ct. 1977).

but may be granted such power pursuant to municipal ordinance in the political subdivision in which they are commissioned.¹⁴⁹ Although no statutory authority exists for the commissioning of special deputies, sheriffs continue to issue these commissions.¹⁵⁰

The case law attempts to define the authority based upon the type of commission involved. However, even within these categories, disagreement may exist among courts as to the scope of authority that may be exercised lawfully.¹⁵¹ With little statutory guidance, the approach of the courts seems to be result-oriented. If tortious conduct or a constitutional rights violation is alleged, the courts attempt to find that the special police officer's actions were outside the scope of public duty.¹⁵² In criminal cases the courts seem to allow special police greater latitude in effecting arrests.¹⁵³

The preferable approach mandates that special police who are employed as private security personnel cannot act simultaneously as both public and private officials. If security personnel, by virtue of possessing commissions such as the special deputy commission, are given full power of arrest and detention, merchants could create their own private police forces simply by obtaining commissions for some or all of their security personnel. Public policy militates against a private police force subject only to the control and direction of the merchant employing it. A peace officer is charged with the duties "to preserve the peace, to protect life and property, and to enforce the laws of Ohio"¹⁵⁴ Private security personnel should not, by virtue of a special police commission, be authorized to exercise peace officer powers for the private benefit of their employer, rather than for the public benefit which peace officers must strive to protect.

Further, private security personnel generally are not subject to the basic peace officer training course.¹⁵⁵ Private security personnel should not possess the same

149. See, e.g., *City of Cleveland v. Kufrin*, 3 Ohio Misc. 2d 18, 446 N.E.2d 230 (Cleveland Mun. Ct. 1982).

150. See, e.g., *State v. McDaniel*, 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975); *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985).

151. See *supra* Part IV for a discussion of the case law concerning each category of special police.

152. *State v. Bolan*, 27 Ohio St. 2d 15, 271 N.E.2d 839 (1971) (*Miranda* warnings not required before interrogation of shoplifting suspect by security guard because no state action), see *supra* note 131; *State v. McDaniel*, 44 Ohio App. 2d 163, 337 N.E.2d 173 (1975) (search and seizure not unconstitutional because not state action), see *supra* note 109; *Duff v. Corn*, 84 Ohio App. 403, 87 N.E.2d 731 (1947) (wrongful death caused by deputy attributed to private employer), see *supra* note 100; *Garman v. O'Neill*, 31 Ohio L. Abs. 650 (Ct. App. 1939) (negligence of deputy attributed to private employer), see *supra* note 95; but see *New York, C. & St. L. R.R. v. Fieback*, 87 Ohio St. 2d 254, 100 N.E. 889 (1912) (no assault because railroad officer within scope of official duty), see *supra* note 69; *Neapolitan v. United States Steel Corp.*, 149 N.E.2d 589, (Ohio Ct. App. 1956) (no false imprisonment because private police officers within scope of official duties), see *supra* note 77.

153. *State v. Glover*, 52 Ohio App. 2d 35, 367 N.E.2d 1202 (1976) (off-duty police officer within official duties in arresting shoplifting suspect), see *supra* note 54; *City of Cleveland v. Kufrin*, 3 Ohio Misc. 2d 18, 446 N.E.2d 230 (Cleveland Mun. Ct. 1982) (private police officer within official duties in conducting warrantless arrest of person observed committing misdemeanor), see *supra* note 80; but see, *State v. Fields*, 62 Ohio Misc. 14, 405 N.E.2d 740 (Ct. App. 1979) (township constable had no power of arrest since he cannot be simultaneously the agent of both township and merchant), see *supra* note 58; *State v. Griffin*, 54 Ohio Misc. 52, 376 N.E.2d 1364 (Akron Mun. Ct. 1977) (special police commission confers no authority to arrest while acting in private capacity), see *supra* note 143.

154. OHIO REV. CODE ANN. § 109.71(A)(1) (Page 1984).

155. See *supra* Part II.

powers as peace officers unless they receive training which will adequately prepare them to exercise such powers.

Perhaps the greatest danger is the absence of clearly defined powers and limitations of special police. Constitutional issues such as search and seizure and *Miranda* warnings have been raised but not finally resolved as to all categories of special police.¹⁵⁶ The power of arrest possessed by special police is similarly clouded.¹⁵⁷ Until the limits of authority of special police are resolved, the public remains exposed to the risk of being detained, arrested, questioned, and searched unconstitutionally by special police. Likewise, the public remains vulnerable to torts committed by officers who believe that they are pursuing their official duties.¹⁵⁸

The various categories of special police should be statutorily eliminated, because regardless of the title used, all of these persons are performing private security functions. A mandatory training program should be established and tailored to the private security role of special police. The program should concern many of the subjects contained in the basic peace officer training course,¹⁵⁹ and should present these topics in the context of the limited scope of authority of special police.

To do their job effectively, special police should be given a limited power of detention, but should not be authorized to make arrests. A power of detention similar to that granted by the shopkeeper's statute,¹⁶⁰ which allows merchants and their employees to detain shoplifters so that they can be arrested by a peace officer, if not limited to shoplifting, would give the special police adequate authority to perform their jobs. However, this power should be clearly limited by statute and should be given only to those officers who complete the suggested training.

Although they are not peace officers, special police should be categorized as public officers to prevent a private employer from creating a police force subject only to private control. For example, the legislature could categorize private security personnel seeking commissions as special deputies and could define the enhanced attendant authority. The sheriff of each county could monitor their activities. While the interest of the public is often coextensive with that of the private employer, such as in the prevention of shoplifting, an overzealous special police officer may be tempted to exceed statutory powers.¹⁶¹ Control of commissioned special police will ensure that these officers exercise their authority for the public good, and it will protect the public from unauthorized detentions, arrests, and tortious conduct engendered by the current system.

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156. See *supra* text accompanying notes 109-20, 131-42.

157. See *supra* text accompanying notes 58-65, 143-46.

158. See, e.g., *New York, C. & St. L. R.R. v. Fieback*, 87 Ohio St. 254, 100 N.E.889 (1912) (assault), see *supra* note 69; *Duff v. Corn*, 84 Ohio App. 403, 87 N.E.2d 731 (1947) (wrongful death), see *supra* note 100; *Garman v. O'Neill*, 31 Ohio L. Abs. 650 (Ct. App. 1939) (negligence), see *supra* note 95; *Bennett v. F. & R. Lazarus*, Case No. 83CV-02-1245 (Franklin County C.P., March 5, 1985) (false arrest), see *supra* note 121.

159. See *supra* Part II (C).

160. OHIO REV. CODE ANN. § 2935.041 (Page 1982).

161. For example, a commissioned plant guard may be tempted to search a detainee suspected of petty theft to recover the items believed stolen.

